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US PERPETUAL TRUSTS

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In 2009, the UK reconfirmed its long-standing public policy against perpetual trusts.¹ America has been moving in the opposite direction. Recent years have seen a movement in the states to pass legislation allowing settlors to create family trusts that can last forever² or for several centuries.³

Sadly, and embarrassingly, the American perpetual-trust movement has not been based on the merits of removing the traditional curb on excessive dead-hand control. The policy issues associated with allowing perpetual trusts have not been seriously discussed in the state legislatures. The driving force has been interstate competition for trust business.⁴

The perpetual-trust movement was made possible by an inadvertent omission in an act of the U.S. Congress. When family property in the US shifts from generation to generation or bypasses a generation without incurring federal estate or gift taxes, the void is filled by another tax called the federal generation-skipping transfer tax (GST tax). The GST tax, however, contains an exemption. The GST exemption allows settlors to create trusts that will never incur GST taxes. Congress originally set the maximum exemption at \$1 million (\$2 million for a married couple), but later pegged the exemption to the maximum estate tax exemption which Congress increased, over time, to \$3.5 million (\$7 million for a married couple). As the 2010 legislative session wound down, Congress increased the cap again, this time to \$5 million (\$10 million for a married couple), and indexed the cap for inflation.⁵ A GST-exempt trust retains its exemption no matter how much the trust's post-creation value appreciates above the maximum exemption amount.

When, in 1986, the Congress adopted the GST tax, it made a fatal mistake. It omitted any durational limit on the GST exemption and instead relied on state perpetuity law to control the duration of GST-exempt trusts. Although state perpetuity law was then undergoing reform, the reforms retained the basic durational

* *Reporter, Restatement (Third) of Property: Wills and Other Donative Transfers*. Although parts of this essay are based on the *Restatement's* discussion of the same topic, the essay itself has not been submitted to or approved by the American Law Institute.

¹ See Perpetuities and Accumulations Act 2009 s.5 (125-year limit). The Act is based on the proposal advanced by the Law Commission, *The Rule Against Perpetuities and Excessive Accumulations* (HMSO, 1998) Law Com. No.251.

² E.g. Alaska, Delaware, District of Columbia, Idaho, Illinois, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Virginia and Wisconsin.

³ E.g. 1,000 years in Colorado, Utah and Wyoming; 500 years in Arizona; 365 years in Nevada; 360 years in Florida, Michigan and Tennessee.

⁴ See R.H. Sitkoff and M.M. Schanzenbach, "Jurisdictional Competition for Trust Funds: an Empirical Analysis of Perpetuities and Taxes" (2005) 115 Yale L.J. 356 at 410; M.M. Schanzenbach and R.H. Sitkoff, "Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust" (2006) 27 Cardozo L.R. 2465.

⁵ Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ss.302(a)(1) and 303(b)(2), <http://finance.senate.gov/legislation/details/?id=10874ed6-5056-a032-52cd-99708697eff0>. As a result of a political compromise, the increased cap is effective only through 2012, which means that Congress will need to revisit the question at the end of 2012. See also text accompanying fnn.49 and 50 below. Had Congress not acted when it did, the cap would have automatically reverted on January 1, 2011 to the original amount of \$1 million (\$2 million for a married couple).

limit that has been part of Anglo-American law for centuries.⁶ State perpetuity law, however, soon crumbled in the face of the lobbying efforts of local lawyers and banks and other financial institutions who gradually began to see the marketing potential of offering trusts that would be perpetually tax exempt.⁷ In a 2004 Wells Fargo Bank advertisement for South Dakota perpetual trusts, the bank proudly proclaimed:

“Imagine a place where there is no rule against perpetuities. Where there is no fiduciary income tax. And where a knowledgeable, experienced staff can make a generation-skipping trust possible. Benefit from a team that offers personal, professional management when you need it, now and in the future.”⁸

The marketing worked. As the legislative momentum allowing perpetual trusts began to build, the wealthy promptly responded by creating them.⁹ An empirical study based on data through 2003 established that the wealthy are creating GST-exempt perpetual trusts in large numbers in the trust-friendly states.¹⁰ Considerable private wealth is pouring into GST-exempt trusts from out-of-state settlors, thereby escaping federal transfer taxation for centuries and in some cases forever. The states that attract the most trust business are those (such as South Dakota) that do not tax trust income produced by funds originating from out of state.¹¹ The authors of the empirical study found that roughly \$100 billion in trust assets had flowed into these states.¹² It seems safe to conclude that considerably more wealth has moved into these states in the years following 2003.¹³ Moreover, the \$100 billion figure undercounts the actual value of trust assets streaming into these states, because the data sources on which the study was based were reports

⁶ See L.W. Waggoner, “Wait and See: The New American Uniform Act on Perpetuities” [1987] C.L.J. 234.

⁷ The perpetual-trust movement began taking hold in the late 1990s and early 2000s. Before then, the Uniform Act on Perpetuities, see fn.6 above, had become the majority rule in the US. But the Uniform Law Commission, nccusl.org, which promulgated the Uniform Act, could not overcome the lobbying power of the local lawyers, banks and other financial institutions that wanted to be able to offer and administer perpetually tax-exempt trusts. See R.D. Madoff, *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press, 2010), at pp.80–82 (noting that “Congress created a marketing bonanza for banks and trust companies” and that perpetual trusts have “been tremendously profitable for banks and other financial service companies, which can generate large fees administering these long term trusts”).

⁸ The advertisement, complete with a background image of a tranquil rural scene, was originally published in various magazines for estate planning professionals and is reproduced in leading American casebooks. See J. Dukeminier, R.H. Sitkoff and J. Lindgren, *Wills, Trusts, and Estates*, 8th edn (New York: Aspen, 2009), at p.908; L.W. Waggoner, G.S. Alexander, M.L. Fellows and T.P. Gallanis, *Family Property Law: Wills, Trusts, and Future Interests*, 4th edn (New York: Foundation Press, 2006), at p.19–2. The Wells Fargo website today advertises perpetual trusts more modestly, saying merely: “Protect your wealth for generations to come with a legacy trust”. See <https://www.wellsfargo.com/theprivatebank/oursolutions/specializedwealthsolutions>.

⁹ Before enactment of the GST tax in 1986, it was possible to create perpetual trusts in a small number of American states, but the evidence shows that settlors had little desire to create them. See Schanzenbach and Sitkoff, “Perpetuities or Taxes?” (2006) 27 Cardozo L.R. 2465. It apparently takes a tax incentive to arouse dynastic impulses.

¹⁰ See Sitkoff and Schanzenbach, “Jurisdictional Competition for Trust Funds” (2005) 115 Yale L.J. 356.

¹¹ See Sitkoff and Schanzenbach, “Jurisdictional Competition for Trust Funds” (2005) 115 Yale L.J. 356 at 410. States that levy an income tax on out-of-state trust funds experienced no observable increase in trust business. See Sitkoff and Schanzenbach, “Jurisdictional Competition for Trust Funds” (2005) 115 Yale L.J. 356 at 420.

¹² See Sitkoff and Schanzenbach, “Jurisdictional Competition for Trust Funds” (2005) 115 Yale L.J. 356 at 359. See also text accompanying fnn.51 and 52 below.

¹³ See Madoff, *Immortality and the Law*, 2010, at pp.80–82; Editorial, “America’s Most Wealth Friendly States Continue to Bid for Your Clients’ Trust Business” (2010) The Trust Advisor Blog, <http://thetrustadvisor.com/news/states/>; K. McNamara, “States Want Your Trust” Wall St. J., June 14, 2010, at p.R4. In an obvious attempt to attract offshore money, Bermuda recently authorised perpetual trusts, except as the trust relates to Bermuda land. See Bermuda Perpetuities and Accumulations Act 2009, discussed favourably in T. Molloy and T. Graham, Editorial, “Thousand year trusts?” (2009) 15 *Trusts & Trustees* 710; H. Moss, “Bermuda—the Perpetuities and Accumulations Act 2009” (2009) 15 *Trusts & Trustees* 719; R. Krebs, “Bermuda abolishes the rules against perpetuities and accumulations” (2009) 15 *Trusts & Trustees* 722.

from federal regulatory agencies.¹⁴ These reports contain no data on trusts in which the trustee is a family trust company, organised for the limited purpose of administering trusts of one family. Family trust companies, which are becoming popular vehicles for administering perpetual trusts of the very wealthy,¹⁵ are regulated, if at all, by state law,¹⁶ not federal law, and consequently do not report to federal agencies.

Although a GST-exempt trust of a few million dollars represents a small portion of the net worth of the truly wealthy, various estate planning techniques can be used to leverage the amount exempted by an amount that substantially exceeds the exemption's cap.¹⁷ And the assets, once in the trust, can be invested in vehicles not normally available to ordinary investors. For example, the trustee, which can be a family trust company or a financial institution under a directed-trust arrangement,¹⁸ can be authorised to purchase or retain assets such as second-to-die life insurance policies, start-up businesses, and minority or non-voting interests in existing family businesses at discounted values through note-sales or other devices.¹⁹ The trustee can also be authorised to purchase or retain property such as vacation homes and private airplanes for the tax-free use of the beneficiaries. In addition, the trustee can be authorised to hire sophisticated investment managers and invest in assets not traded in the public securities markets, assets such as hedge funds, private equity, venture capital funds and real estate.²⁰ Finally, generation after generation can have their interests insulated from creditors through the use of spendthrift clauses.²¹

One wonders whether the state legislators who vote to authorise perpetual trusts and the wealthy who create them have thought through what they are allowing or putting in place.²² The perpetual trusts that are now in existence are only in their first or second decade, so experience with them as they continue past the boundary set by traditional perpetuity law is lacking. Nevertheless, some predictions can be made, since the prototypical perpetual trust is a discretionary trust for the benefit of the settlor's descendants from time to time living forever (or for several centuries).²³ With each step down the generational ladder, the settlor's genetic

¹⁴ See Sitkoff and Schanzenbach, "Jurisdictional Competition for Trust Funds" (2005) 115 Yale L.J. 356 at pp.387-388.

¹⁵ See I.J. Goodwin, "How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune" (2010) 40 Seton Hall L.R. 467, noting at 467-468 that family trust companies are generally thought to be appropriate only for families with a net worth of at least \$200 million.

¹⁶ See Goodwin, "How the Rich Stay Rich" (2010) 40 Seton Hall L.R. 467 at 474-475, noting that family trust companies are lightly regulated by state law in some states and unregulated by state law in other states.

¹⁷ See Goodwin, "How the Rich Stay Rich" (2010) 40 Seton Hall L.R. 467 at 492; Madoff, *Immortality and the Law*, 2010, at pp.62-63.

¹⁸ In a directed trust, the financial institution provides custody and account statement services, but another party (sometimes called a trust advisor or a trust protector) makes some or all of the investment and distributive decisions. See, e.g. D.A. Diamond and T.A. Flubacher, "The Trustee's Role in Directed Trusts" (Dec. 2010) *Trusts & Estates Magazine* 24.

¹⁹ See Madoff, *Immortality and the Law*, 2010, at pp.76-85; Goodwin, "How the Rich Stay Rich" (2010) 40 Seton Hall L.R. 467 at 489-497 (stating at 492 that the note-sale device can be used to leverage the exemption by as much as ten times the exemption's cap).

²⁰ See Goodwin, "How the Rich Stay Rich" (2010) 40 Seton Hall L.R. 467 at 508.

²¹ See Madoff, *Immortality and the Law*, 2010. Spendthrift clauses in the form of disabling restraints on alienation are valid and enforceable in almost all American states. See, e.g. *Broadway Nat'l Bank v Adams* (1882) 133 Mass. 170; *Restatement (Third) of Trusts* s.58.

²² For perspective, one notes, with some disquiet, that the *Law Quarterly Review* has only been publishing for a mere 127 years and the *Harvard Law Review* for a mere 124 years.

²³ See R.W. Nenko, *Delaware Dynasty Trusts, Total Return Trusts, and Asset Protection Trusts* (Thomson/West, 2006), at pp.182-184.

relationship with the descendant-beneficiaries declines rather precipitously. On average, and disregarding nongenetic descendants such as adoptees, a settlor's genetic relationship with his or her descendants is cut in half at each succeeding generation. At the 14th generation (i.e. the generation born about 300 years after the settlor's death), the settlor's genetic relationship is reduced to about 0.0061 per cent, which—due to our common origins—is about the same relationship one has with any randomly selected member of the population.²⁴

As the settlor's genetic relationship with the beneficiaries declines, the number of descendant-beneficiaries proliferates.²⁵ Some 150 years since its creation, a GST-exempt perpetual trust could have about 450 living beneficiaries; after 250 years, more than 7,000 living beneficiaries; after 350 years, about 114,500 living beneficiaries.²⁶ This means that 350 years after creation, Wembley Stadium would not be large enough to hold them all. Nor, in America, would the Rose Bowl or any other sports stadium. The beneficiaries would have to book Rungrado May Day Stadium in Pyongyang, North Korea or Salt Lake Stadium in Kolkata, India for a meeting.²⁷

As the trust drifts deeper and deeper into its second and third centuries and beyond, and long after the settlor and the attorney responsible for proposing and drafting the trust have passed away, the beneficiaries will, to be sure, share a common ancestor, but their common ancestor will be very remote and they will have branched into thousands of individual three- or four-generation families basically unaware of their relationship with all but the closest of the other branches. Readers of this essay can be expected to know their brothers and sisters (at least those of the whole blood²⁸) and their descendants, probably their first cousins and their descendants, and possibly even their second cousins and some or all of their descendants. But few would know or know of their third or fourth cousins, let alone the tens of thousands of their remote relatives in more distant branches. To pick up on the language of the Wells Fargo advertisement,²⁹ imagine a perpetual trust in which the more-than-100,000 living beneficiaries include US President Barack Obama and his descendants, and former US President George HW Bush and his descendants (including former US President George W Bush). Or, a perpetual trust in which the more-than-100,000 living beneficiaries include US President Obama and his descendants, and former US Vice-President Richard Cheney and his descendants. Well, both trusts would exist and still be operating today if Samuel Hinckley, who died in Massachusetts in 1662, had created a

²⁴ See J.H. Beckstrom, "Sociobiology and Intestate Wealth Transfers" (1981) 76 N.W.U. L. Rev. 216 at 232, citing R. Dawkins, *The Selfish Gene* (Oxford University Press, 1976), at p.100.

²⁵ See *Restatement (Third) of Property: Wills and Other Donative Transfers*, Vol.3, introductory note to Ch.27 (Philadelphia: ALI, 2011); L.W. Waggoner, "Curtailling Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised" (2010) *University of Michigan Public Law Working Paper No.199*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614934.

²⁶ See Waggoner, "Curtailling Dead-Hand Control" (2010) *University of Michigan Public Law Working Paper No.199*. The projections are based on the following averages: life expectancy of 75 years, two children per couple and 25-year separation between generations. The projections are also based on the assumption that the trust was created when the settlor had two children and four grandchildren.

²⁷ See http://en.wikipedia.org/wiki/List_of_stadiums_by_capacity.

²⁸ In an age of multiple marriages and other formal and informal multiple relationships, some might not know or know of all of their half brothers and sisters. In the 1990s, several men claimed to be half brothers of then US President Bill Clinton. See, e.g. J. Gross, "Clinton's Lost Half Brother? To Neighbors, He's Just Leon", N.Y. Times, June 22, 1993, at <http://www.nytimes.com/1993/06/22/us/clinton-s-lost-half-brother-to-neighbors-he-s-just-leon.html>.

²⁹ See fn.8 above.

perpetual trust for his descendants,³⁰ and if Mareen Duvall, who died in Maryland in 1694, had created a perpetual trust for her descendants.³¹

Four hundred and fifty years after a GST-exempt perpetual trust is created, the number of living beneficiaries of that one trust could rise to 1.8 million. Yes, 1.8 million beneficiaries of one trust, each with standing to bring a lawsuit against the trustee for violation of any of the trustee's fiduciary duties.

A trustee operates under a strict duty to distribute trust funds only to those persons who qualify as beneficiaries.³² The trustee who makes a mistaken distribution to a non-beneficiary "is liable although [the trustee] reasonably believes that the person to whom [the trustee] pays or conveys is the beneficiary".³³ Because a trustee acts at peril for mistaken distributions,³⁴ the trustee must investigate whether a person who claims to be a beneficiary does in fact qualify. If, however, a trust were to have thousands or tens of thousands of potential beneficiaries, centuries removed from the settlor by descent, the task of ascertaining and verifying which persons qualify as beneficiaries will be enormously complex and expensive.

A trustee also operates under the duty of impartiality, which provides that:

"... in investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust".³⁵

The Restatement of Trusts provides that the duty of impartiality:

"... is important not only, for example, in balancing the naturally conflicting concerns of life and remainder beneficiaries but also whenever multiple income beneficiaries have significantly differing needs and tax positions, or when multiple remainder beneficiaries have significantly different objectives and risk tolerance."³⁶

Moreover, in discharging the duty of impartiality:

"... a trustee will often find it desirable, and sometimes important or even necessary, to consult with beneficiaries and obtain information from them concerning their financial needs and circumstances and perhaps their preferences concerning matters of trust administration".³⁷

Just how the trustee of a perpetual trust with hundreds of thousands of beneficiaries with conflicting interests will be able to consult them appropriately, investigate their "needs and circumstances", and give due "regard" to the interests of each, is difficult to comprehend. The answer perhaps is that artificial intelligence technology, now in its infancy, or future technologies yet to be imagined, will in

³⁰ See New England Historic Genealogical Society, <http://www.newenglandancestors.org/about/7320.asp>.

³¹ See New England Historic Genealogical Society, fn. 30 above. In the UK, Queen Elizabeth II and Prime Minister David Cameron share a remote common ancestor and are fifth cousins twice removed. See A. Pierce, "Cameron's Royal Link Makes Him a True Blue", *The Times*, December 5, 2005, <http://www.timesonline.co.uk/tol/news/politics/article745903.ece>.

³² See *Restatement (Second) of Trusts* s.226.

³³ See *Restatement (Second) of Trusts* s.226, at Comment b.

³⁴ See *National Academy of Sciences v Cambridge Trust Co* (1976) 346 N.E. 2d 879 at 885 (prior judicial accountings reopened to assess liability against trustee for mistaken payments).

³⁵ *Restatement (Third) of Trusts* s.79(a).

³⁶ *Restatement (Third) of Trusts* s.79(b), at Comment a.

³⁷ *Restatement (Third) of Trusts* s.79(b), at Comment d.

time take over more and more of the management and distributive functions with less and less human oversight, but perhaps not. All of this is part of the vast unknown. One certainty is that the costs of trust administration, however significant, will be payable from the trust property.³⁸

Speaking of the trustee's fiduciary duties raises another matter that should be of concern to the state legislators who vote to authorise perpetual trusts and the settlors who create them: who is going to serve as trustee over these vast intervals? In an era in which banks and other financial institutions go out of business, merge or are taken over by other banks or financial institutions, the bank or financial institution originally selected will not likely continue in anything like its present form for the next 200 years, 300 years, or for infinity.³⁹ Over vast intervals such as these, the identity, location, capabilities and expertise of the trustee will likely change many times over. Trustee turnover is enough of a problem for a trust whose duration is within the traditional perpetuity limit of 100 years or so. The problem will surely be more acute for a trust spanning several centuries or lasting forever. Perhaps the problem of trustee turnover is of less concern in the case of a family trust company, if the only thing that is meant by trustee turnover is the name of the entity.⁴⁰ Staffing and the need to keep up technologically are other matters. Over time, a family trust company will experience the same turnover and expansion in personnel as an institutional trustee, and will have the same needs for constantly updating the technology required to keep up with so many beneficiaries. A family trust company, moreover, will not be as well capitalised as a larger, federally regulated institutional trustee. As the beneficiaries grow into the tens of thousands and divide into thousands of branches mostly unknown to one another, conflicts over management and distribution seem inevitable, and successful lawsuits could very well bankrupt a family trust company. In the end, whether the trustee is a financial institution whose trust services are open to the general public or a family trust company open only to family members, the problem of trustee turnover will be about the same. The personnel and technology necessary to administer a trust with 15 or fewer beneficiaries (two children, four grandchildren, and as many as eight great-grandchildren) will not look anything like the personnel and technology necessary to manage a trust with 100,000 or more beneficiaries. The trustee, whatever its form, will become a much different entity than the one initially entrusted with the settlor's fortune.

Another important reason for maintaining a reasonable limit on dead-hand control is to ensure that full control of encumbered property will be shifted periodically to the living, free of restrictions imposed centuries earlier by the original settlor. The living can then use the property as they wish, including re-transferring the property into new trusts with up-to-date provisions.⁴¹ By way

³⁸ See *Restatement (Third) of Trusts* s.38.

³⁹ In late 2010, one of the prominent US trust companies that administers perpetual trusts, the Wilmington Trust Company of Wilmington, Delaware, was acquired by the M&T Bank Corp headquartered in Buffalo, New York. See J.D. Epstein, "Serious problems forced Wilmington Trust to sell out", November 28, 2010, <http://www.buffalonews.com/city/communities/downtown/article267529.ece>. Wilmington Trust's serious problems were due to bad loans, not to lack of profitability of the trust department. The M&T Bank Corp has itself gone through many mergers, acquisitions and name changes. See its history as reported on its website at <http://ir.mandtbank.com/>.

⁴⁰ Family trust companies are described in the text accompanying fnn.15 and 16 above.

⁴¹ See R. Deech, "Lives in Being Revived" (1981) 97 L.Q.R. 593 at 594 ("If a settlor or testator had total liberty to dispose of his property among future beneficiaries, the recipients, being fettered by his wishes, would never enjoy that same freedom in their turn. The liberty to make fresh rearrangements of assets is necessary not only in order to

of example, consider one set of provisions that are likely to become increasingly obsolete as time goes by—family class-gift definitions. A perpetual trust drafted today might appear to be flexible if it grants the trustee discretionary powers to distribute income or principal among the settlor's descendants from time to time living. Such a trust, however, will often define the class of descendants according to time-of-creation standards, standards that run the serious risk of becoming out of date as concepts of family change over time. No trust drafted in 1650 or earlier could have contained provisions anticipating the possibility of adopted children,⁴² children of assisted reproduction, or children born to a surrogate mother, much less second-parent adoptions or posthumously conceived children. Likewise, no perpetual trust drafted today will be able to anticipate concepts of family and descent as they change and adjust over vast intervals in the future. Here are just a few questions. Will human cloning become possible, legal and routine? Will the institution of marriage flourish or become obsolete? Will average life expectancy increase so much that five- or six-generation families become commonplace? These and other questions that we cannot now even imagine are troublesome enough for a trust whose duration is within the traditional perpetuity limit of 100 years or so. But the problem will be more troublesome for a trust spanning several centuries or lasting forever.

In the end, no one—no matter how prescient—can imagine what society (including its legal institutions and concepts of family) will be like in the 22nd, 23rd or 24th centuries and beyond, any more than the most prescient in the 17th century could have imagined what society is like today. If the past is any guide to the future, even the terminology in an early 21st century perpetual trust will seem as archaic to those in these distant centuries as the terminology in a 17th century document appears to us today.

Will anything be done about the matter? At the 2010 annual meeting of the American Law Institute (ALI or Institute),⁴³ the Institute declared the perpetual-trust movement ill advised⁴⁴ and proposed limiting trust duration to two younger generations.⁴⁵ But even the prestige of the ALI is overmatched in the state legislatures by the lobbying power of the lawyers who have a stake in the fees they can generate from drafting perpetual trusts and of the banks and other financial institutions that have a financial stake in the higher profits they expect to reap from attracting and administering perpetual trusts.⁴⁶

be rid of irksome conditions attached by earlier donors to the enjoyment of income but also in order to be able to manœuvre in the light of new tax laws, changes in the nature of the property and in the personal circumstances of the beneficiaries, unforeseeable by the best-intentioned and most perspicacious of donors.”)

⁴² Adoption was first authorised in England in 1926. See *Adoption of Children Act 1926*. In the United States, adoption began to be authorised in the mid-19th century. See E.W. Carp, *Family Matters: Secrecy and Disclosure in the History of Adoption* (Harvard University Press, 1998), at p.11.

⁴³ See <http://www.ali.org/>.

⁴⁴ See Waggoner, “Curtailling Dead-Hand Control” (2010) *University of Michigan Public Law Working Paper* No.199. The floor vote was unanimous.

⁴⁵ In general terms, the Institute’s new approach provides that a trust or other donative disposition of property is subject to judicial modification to the extent that the trust does not terminate on or before the expiration of the perpetuity period. The perpetuity period expires at the death of the last living measuring life, defined as a group composed of the settlor and the beneficiaries of the disposition who are no more than two generations younger than the settlor. For more on the Institute’s new approach to perpetuities, see L.W. Waggoner, “The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations” (2010) *University of Michigan Public Law Working Paper* No.200, <http://ssrn.com/abstract=1614936>.

⁴⁶ See Madoff, *Immortality and the Law*, 2010; S. Martin, “Sante Fe Trust Eyes South Dakota for Dynastic Trusts” (2011) *The Trust Advisor Blog*, <http://thetrustadvisor.com/news/santafe>; “Expert Says Delaware and South Dakota Trust Providers Should Boost Fees” (2010) *The Trust Advisor Blog*, <http://thetrustadvisor.com/practice-management>

Only Congress can put a stop to the perpetual-trust movement.⁴⁷ A 2005 staff report of the US Joint Committee on Taxation proposed a durational limit on the GST exemption coincident with the ALI perpetuity proposal, i.e. a two-younger-generation limit.⁴⁸ Whether Congress, distracted as it is with so many other matters, will ever reverse what it has thoughtlessly wrought remains to be seen. Congress made no attempt to do so in the tax bill it passed in the waning days of 2010 and, in a controversial move, exacerbated the problem by increasing the cap to \$5 million (\$10 million for a married couple).⁴⁹

As a result of a political compromise, Congress provided that the larger cap expires at the end of 2012, after which the cap will automatically revert to the original amount of \$1 million (\$2 million for a married couple).⁵⁰ Although the risk that Congress will allow that to happen appears negligible, the uncertainty—slight as it is—might motivate some of the super rich to take advantage of the 2011 to 2012 window by pouring more wealth into perpetual trusts than they might otherwise have done. As one prominent estate planning attorney noted:

“With a GST exemption of \$5 million, the barn door [is now] open for very high net worth clients to lock in huge savings in transfer taxes, potentially for many generations.”⁵¹

And as another commentator noted:

“Billions of dollars of assets were no doubt removed from future estate taxes through [exempt trusts for grandchildren and more remote generations]; I know of more than \$1 billion in New York City alone.”⁵²

/value; B.W. Fraser, “The Rush to Dynasty Trusts” (2005) *Financial Advisor Magazine*, <http://www.fa-mag.com/component/content/article/1-features/1145.html>; S. Martin, “Trust Baron Jeff Durham Wows Advisors with Dynastic Trusts” (2011) *The Trust Advisor Blog*, <http://thetrustadvisor.com/news/dunham> (“Nailing down management fees across generations has become a natural sell for the Nevada-based trust company.”); S. Martin, “Kansas Trust Company To Restart in South Dakota” (2010) *The Trust Advisor Blog*, <http://thetrustadvisor.com/news/greatplains>.

⁴⁷ See R.D. Madoff, “America Builds an Aristocracy” *N.Y. Times*, July 12, 2010, at p.A19, http://www.nytimes.com/2010/07/12/opinion/12madoff.html?_r=1&scp=1&sq=madoff%2C+america+builds+an+aristocracy&st=nyt; J.B. Quinn, “Estate Taxes: Why Congress Needs to Plug the Loophole That Builds Up Dynastic Wealth” *CBSMoneyWatch.com*, December 1, 2010, <http://moneywatch.bnet.com/investing/blog/make-money/estate-taxes-why-congress-needs-to-plug-the-loophole-that-builds-up-dynastic-wealth/676/?tag=coll:fd-banner-news>; L.W. Waggoner, “Message to Congress: Halt the Tax Exemption for Perpetual Trusts” (2010) *University of Michigan Public Law Working Paper No.206*, <http://ssrn.com/abstract=1652791>; L.W. Waggoner, Commentary, “Message to Congress: Halt the Tax Exemption for Perpetual Trusts” (2010) 109 *Mich. L. Rev. First Impressions* 23, <http://www.michiganlawreview.org/assets/fi/109/waggoner.pdf>; L.W. Waggoner, “Congress Should Impose a Two-Generation Limit on the GST Exemption: Here’s Why” (2010) *University of Michigan Public Law Working Paper No.205*, <http://ssrn.com/abstract=1640742>.

⁴⁸ The staff proposed that a trust that could last beyond two younger generations should not qualify for the GST exemption. See Staff Report of Joint Committee on Taxation, “Options to Improve Tax Compliance and Reform Tax Expenditures” (January 27, 2005), at p.393, <http://www.house.gov/jct/s-2-05.pdf> (JCS-02-05). More recently, the Obama Administration’s Fiscal Year 2012 Budget, submitted to Congress on February 14, 2011, contains a proposal that, if enacted, would place a 90-year durational limit on the GST exemption. See Department of the Treasury, “General Explanations of the Administration’s Fiscal Year 2012 Revenue Proposals” (February 14, 2011), at pp.129–130, <http://www.treasury.gov/resource-center/tax-policy/Documents/Final%20Greenbook%20Feb%202012.pdf>.

⁴⁹ See fn.5 above and accompanying text.

⁵⁰ See fn.5 above.

⁵¹ The quote is from a message posted on December 12, 2010 on the list serve of the American College of Trust and Estate Counsel. The posted message is on file with the author.

⁵² M.J. Graetz, “The Politics and Policy of the Estate Tax—Past, Present, and Future” (2011) *Yale Law & Economics Research Paper No.425*, at p.11, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755161. From 1990 to 1991, Professor Graetz served as Deputy Assistant Secretary for Tax Policy in the US Department of the Treasury.

The fact is that Congress will, at the latest, revisit the question as the time for expiration of the larger cap grows closer. One hopes that when it does, Congress will not only reconsider the amount of the cap but will also realise how much revenue has been lost and will continue to be lost by the absence of a durational limit. A welcome by-product of a durational limit, especially the one proposed by the staff of the Joint Committee on Taxation,⁵³ would be the demise of the US perpetual-trust movement.⁵⁴

⁵³ See fn.48 above and accompanying text.

⁵⁴ Perpetuities; Trustees' powers and duties; Trusts; United States

⁵⁴ See fn.9 above.